No. 85-1581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD SOLORIO,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Military Appeals

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the fact that the victim is a military dependent, without more, sufficient "service connection" to support the exercise of court-martial jurisdiction over an off-base civilian-type offense?

2. Was the decision below, which found court-martial jurisdiction in circumstances in which previous decisions had refused to do so, a plain violation of the rule of Bouie v. City of Columbia, 378 U.S. 347 (1964)?

INDEX

TABLE OF AUTHORITIES

Cases:

Constitutions and Statutes:

Regulations and Rules of Court:

Miscellaneous:

Interest of the Amicus

The American Civil Liberties Union (ACLU) is a nationwide nonpartisan voluntary organization dedicated to the protection of constitutional rights. The ACLU has long taken an interest in the administration of criminal justice in the military, in addition to its general interest in the vindication of constitutional rights in civilian state and federal courts. Thus, the ACLU regularly appears as an amicus curiae in the United States Court of Military Appeals in cases that affect all the services.

The ACLU ordinarily avoids participating as an amicus prior to the grant of review. But the generic implications

of the decision below--which dramatically and unconstitutionally expands court-martial jurisdiction in the teeth of this Court's precedents as well as those of the court below--make this a case where such participation is imperative.[1]

In addition, the ACLU was actively involved in the legislative process leading to passage of the Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, section 10 of which for the first time extended this Court's certiorari jurisdiction to a

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1. Consents from petitioner and respondent have been filed with the Clerk.

2. See generally The Military Justice Act of 1982: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Sen. Comm. on Armed Services, 97th Cong., 2d sess. 198-263 (1982).

limited category of court-martial convictions.[2] To the extent that this case calls upon the Court to address for the first time the considerations governing the grant of certiorari in military cases arising on interlocutory government appeal, the Court, it is believed, would benefit from having the ACLU's views.

Argument

I.

THE SWEEPING IMPACT OF THE DECISION BELOW AND THE UNIQUE STATUTORY LIMITATIONS ON APPELLATE REVIEW OF COURTS-MARTIAL MAKE REVIEW BY THIS COURT AN URGENT PRIORITY

The facts of the case have been fairly stated in the Petition. In essence, the case presents for review the question whether, under O'Callahan v.

Parker, 395 U.S. 258 (1969), military jurisdiction over an off-base civilian-type offense may be predicated solely on the fortuity that the victim is a military dependent. While the question arises in the context of a Coast Guard court-martial, the decision below affects all of the military services. Its impact will be sweeping.[3]

As of March 31, 1985, there were 2,147,845 persons in uniform in the Army, Navy, Marine Corps and Air Force, of whom 1,398,779 were on active duty in the 50

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3. In addition, as we show in Point II infra, the case involves a clear violation of the rule that a new interpretation of a criminal statute may not be applied to conduct occurring prior to that interpretation. Hence, even if the decision below were correct on the merits (which it is not), the case would still have to be reversed.

States. As of September 30, 1984, there were 2,851,392 military dependents, of whom 2,462,222 were living in the 50 States.[4]

These data do not include dependents of military retirees. A subsequent decision of the court below, United States v. Scott, 21 M.J. 345 (C.M.A. 1986), appears to expand military jurisdiction over off-base civilian-type offenses (at least where the accused is an officer) to cases where the victim is a dependent of a retired military person even though the rule had long been that off-base civilian-type offenses against

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4. See generally Dep't of Defense, Defense '85 Almanac 24, 25-27, 31 (Sept. 1985). During Fiscal Year 1984, 12,009 persons were convicted by general or special courts-martial. 1984 Ann. Rep. of Code Comm. on Military Justice (1985).

retirees themselves were not subject to court-martial jurisdiction. United States v. Armes, 19 C.M.A. 15, 41 C.M.R. 15 (1969). Dependents of retired military personnel number in the millions.

Thus, the decision below signals a geometric increase in the pool of persons against whom civilian-type offenses may give rise to military prosecution. It correspondingly expands the reach of military jurisdiction beyond anything heretofore contemplated. Accordingly, certiorari should be granted.

The ACLU is mindful of the fact that this criminal case arises on interlocutory appeal--a procedural posture that sometimes influences the Court to withhold review. But see, e.g.,

Missouri v. Blair, No. 85-303, 54 U.S.L.W. 3460 (U.S. Jan. 13, 1986) (granting cert.). We respectfully submit that the unique aspects of direct review of court-martial convictions and events subsequent to the decision below combine to militate strongly in favor of an exception to that approach.

First, looking at the potential ramifications of taking review of a case such as this, the Court should have no concern about being buried under an avalanche of certiorari petitions in interlocutory appeals under Article 62 of the Uniform Code of Military Justice (UCMJ). 10 U.S.C. sec. 862 (Supp. III 1985). From the time the new certiorari provision of the Code took effect on August 1, 1984, to February 27, 1986,

there were only 13 petitions to the Court of Military Appeals for discretionary review of court of military review decisions under Article 62. Of those, only 6 were granted. Since only granted cases are even eligible for review in this Court, see 10 U.S.C. sec. 867(h)(1)(Supp. III 1985), there need be no concern about impact on the Court's docket.

Moreover, the statutory framework for Supreme Court review of courts-martial is unlike that applicable to either state or civilian federal convictions. All federal criminal cases are appealable as of right to the courts of appeals, 28 U.S.C. secs. 1291-92 (1982), and in State cases, certiorari runs to "the highest court of a State in

which a decision could be had." 28 U.S.C. sec. 1257 (1982). Most military convictions, in contrast, are not subject to direct review in any court, see generally Fidell, Military Rights of Appeal, 8 Dist. Law. No. 6, 42 (July-Aug. 1984), and, more importantly, Congress made no provision for direct review by this Court of cases that either do not meet the sentencing threshold for review in the military judicial system or in which the Court of Military Appeals denies discretionary review. See generally Boskey & Gressman, The Supreme Court's New Certiorari Jurisdiction Over Military Appeals, 102 F.R.D. 329, 336 (1984).

The extraordinary constraints on appellate review of courts-martial in

general, and the absence of a provision for certiorari to reach cases insulated from or refused review by the higher military courts, make it urgent that this Court take a "hard look" at cases such as Solorio's, which involve sea changes in the jurisdiction of military courts, before concluding that the policy against certiorari in interlocutory criminal appeals should be invoked.

Second, with respect to this particular case, although the decision below was interlocutory (having been stimulated by a prosecution appeal from the dismissal of charges relating to off-base conduct in Alaska), the trial proceeded, and Solorio was convicted on 8 of the 14 Alaska offenses on March 11, 1986. His case will now be reviewed by

the Coast Guard district commander who referred the charges for trial in the first place, and then by the Coast Guard Court of Military Review, which perforce must apply the jurisdictional decision here on review.

Whether the Court of Military Appeals will hear the case following action by the Court of Military Review is an open question. Its jurisdiction over this case is discretionary, and it took no steps in its decision to ensure that the record would be returned to it following completion of the trial. Since this Court can only hear the merits of the case if the Court of Military Appeals grants a petition for review, there can be no assurance that Solorio will ever be able to have the fundamental issue of

jurisdiction examined here on direct review.[5] As a result, the current Petition may be Solorio's only opportunity to obtain review of the issue presented. Cf. Garrison v. Hudson, 104 S. Ct. 3496 (Burger, Circuit Justice 1984)(granting stay).

Indeed, this may be this Court's only opportunity to review the important issue presented on the merits since the service connection question will now be considered settled law by the courts

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5. Collateral review is unlikely since the military does not make free counsel available for that purpose, and public defender programs do not include military accuseds in their activities. In any event, collateral review is not a substitute for direct review in an Article III court. Guam v. Olsen, 431 U.S. 195, 202 (1977). This Court is the only Article III court with appellate jurisdiction over the Court of Military Appeals. Hearings, supra, at 212 n.13 (ACLU testimony).

below. The Court of Military Appeals can thus be expected to deny petitions for review on the issue, thereby precluding review here.

In the circumstances, while the ACLU strongly believes that no useful purpose would be served by delaying the reversal this case merits, we recognize that the Court might wish to defer action on the Petition until it becomes clear whether the case will ever come before it following final review of the conviction.[6] If the Court of Military Appeals denies review, the Court could proceed to address the merits of the current Petition; if that court grants

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6. See generally R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice sec. 5.9, at 274 (6th ed. 1986)(collecting cases).

review and a second Petition is filed, the two cases could be consolidated.

II.

BECAUSE THE DECISION BELOW OVERRULED PRIOR DECISIONS REFUSING TO PERMIT COURT-MARTIAL JURISDICTION TO BE PREDICATED SOLELY ON THE VICTIM'S STATUS AS A DEPENDENT, IT WAS A VIOLATION OF DUE PROCESS TO APPLY A DIFFERENT RULE TO SOLORIO

The decision below is a textbook illustration of the practice condemned in Bouie v. City of Columbia, 378 U.S. 347 (1964), and Marks v. United States, 430 U.S. 188 (1977). A statute simply cannot be reconstrued by a court to criminalize conduct previously held not to be proscribed and the new gloss applied to the very case in which the change is announced, nor, as the Ninth Circuit has observed in another context, could the court below "make a federal crime out of

acts of a defendant which prior to that time had not been federal crimes, but acts punishable under state law." Woxberg v. United States, 329 F.2d 284, 293 (9th Cir. 1964).[7] That is precisely what happened to Solorio.

Any suggestion that the decision below does not represent a substantial break from the precedents is an "appeal to unreality." Sibbach v. Wilson & Co., 312 U.S. 1, 18 (1940)(Frankfurter, J., dissenting). In a series of cases, three

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7. See also United States v. Juvenile, 599 F. Supp. 1126, 1131 (D. Ore. 1984)("retrospective establishment of federal jurisdiction violates the ex post facto clause").

8. United States v. McGonigal, 19 C.M.A. 94, 41 C.M.R. 94 (1969); United States v. Shockley, 18 C.M.A. 610, 40 C.M.R. 322 (1969); United States v. Henderson, 18 C.M.A. 601, 40 C.M.R. 313 (1969).

of which are cited on page 254 of the decision,[8] the court below had held that service connection over off-base civilian-type offenses could not rest solely on the victim's status as a military dependent.[9] Indeed, in Fleiner v. Koch,[10] the court unanimously granted a writ of prohibition barring the trial of charges of indecent assault on and indecent acts with the accused's civilian ward while in civilian premises in San Diego.

Nor can it be said that Solorio

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9. See also United States v. Snyder, 20 C.M.A. 102, 42 C.M.R. 294 (1970)(off-base assault and involuntary manslaughter; held, no service connection), cited in H. Moyer, Justice and the Military 176 (1972).

10. 19 C.M.A. 630 (1969)(mem.), noted in Justice and the Military, supra, at 179.

was on notice because of decisions of the Court of Military Appeals in other O'Callahan cases. That court never suggested, until this case, that its decisions in McGonigal, Shockley, Henderson or Snyder were not good law. United States v. Trottier, 9 M.J. 337 (C.M.A. 1980), cited below for the proposition that "some of our earlier opinions on service-connection should be reexamined in light of more recent conditions and experience," 21 M.J. at 254 & n.1, was a narcotics case and in no way afforded Solorio or anyone else fair notice that the unbroken line of precedents on the precise point here in issue was no longer valid, or represented an area in which one proceeded at one's own risk, so to speak.

The Trottier opinion, which was joined by only two of the judges (the third concurred in the result), went so far as to point out that "drug offenses, through their debilitating effects, have a relevance to combat readiness that rape or robbery normally do not." 9 M.J. at 346 n.22. Far from alerting the reader that sex offenses such as those of which Solorio has been convicted would fall under the same rule, such a comment clearly limited the holding and set narcotics cases aside as a special category.

Events subsequent to Trottier confirm that the victim's status as a dependent has continued to be deemed insufficient to warrant trial by court-martial for off-base offenses that

are civilian in character. For example, even after the time of the offenses of which Solorio was convicted (and while this case was wending its way through the appellate process), a Navy judge dismissed charges of off-base forcible sodomy and assault of an accused's wife. See United States v. Wilson, 21 M.J. 381 (C.M.A. 1985)(mem.). The government obtained a reversal from the Court of Military Review, but the accused appealed to the Court of Military Appeals, which granted a stay. The case was ultimately mooted when he was discharged from the service, but the trial judge's action and the Court of Military Appeals' stay can hardly be reconciled with the claim that Solorio was on notice that his conduct violated the UCMJ.

Even the latest edition of the Manual for Courts-Martial, drafted by the Defense Department, gives no indication that the unbroken line of cases on this point was in doubt. See Manual for Courts-Martial, United States, 1984 at II-14 to -15.

Since the Court of Military Appeals has itself invoked the Bouie principle at least once in the past, United States v. McDonagh, 14 M.J. 415, 419-23 (C.M.A. 1983), we can only surmise that the fact that that court--whose full complement is only three judges--was sitting with two judges may have contributed to a less than complete exploration of the issues. For two judges to overturn an unbroken line of precedents on an important issue would

seem to be particularly unsound as a matter of judicial administration.

III.

THE VICTIM'S STATUS AS A MILITARY DEPENDENT IS INSUFFICIENT, AS A MATTER OF CONSTITUTIONAL PRINCIPLE AND ON THE RECORD OF THIS CASE, TO SUPPORT MILITARY JURISDICTION AND THE CORRESPONDING TRUNCATION OF SOLORIO'S CONSTITUTIONAL RIGHTS

Because the case should be summarily reversed on the authority of Bouie and Marks, the Court need not address the merits of the Court of Military Appeals' ruling on service connection in dependent victim cases. Cf. Relford v. Commandant, U.S. Disciplinary Barracks, 401 U.S. 355, 369-70 (1971)(deferring consideration of retrospectivity). However, in the event the Court declines to reverse on the retroactive reinterpretation point, it

should certainly reverse on the merits.

In Toth v. Quarles, 350 U.S. 11, 22 (1955), the Court held that military tribunals should be restricted "to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among the troops in active service." The decision below is irreconcilable with Toth. Not one of the bases asserted by the Court of Military Appeals withstands serious scrutiny.

1. The court relied on the "recent development in our society" of "an increase in the concern for victims of crimes." 21 M.J. at 254. There is, however, nothing peculiar to the military in this evolution, and nothing in the Victim and Witness Protection Act, Pub. L. No. 97-291, 96 Stat. 1248, cited at 21

M.J. 255 n.2, the relevance of which was neither briefed nor argued below, suggests that Congress intended it to be the fulcrum for an expansion of court-martial subject matter jurisdiction. Alaska has its own legislation for the protection of victims and for their participation in the criminal and parole processes. Alas. Stat. secs. 12.55.022, 12.55.025, 12.61.010, 33.15.065 (1984). None of the other factors cited by the court below in support of its conclusion represents a change from conditions in effect in 1969 when O'Callahan was decided.

2. The court suggested that the distraction or emotional upset associated with the potential knowledge that a servicemember had committed sexual

misconduct with a child would impede others' performance of military duty. This is far too elusive a test for determining whether military jurisdiction exists. Military jurisdiction is not a family affair whose parameters are to be decided by how distraught the victim's relatives (or, for that matter, friends) may be. Many kinds of off-base events could conceivably have an adverse impact on morale, see 21 M.J. at 256, but that is an insufficient foundation for carving an exception to the rule of O'Callahan and Relford that civilian-type offenses should be punished by civil authorities.

3. The right to grand jury indictment is protected under Alaska law, Alas. Const. art. I, sec. 8, trial by jury is available, and trial and

appellate judges (unlike military trial and intermediate appellate judges) enjoy the protection of a term of office. The record is clear that the Alaska offenses could have been prosecuted by the State. Similar offenses had been so prosecuted in the recent past, and the State prosecutor did not refuse to prosecute Solorio. Rather, playing "Alphonse" to the Coast Guard's "Gaston," he "deferred" to the military. But Solorio's due process rights under State law and the Fourteenth Amendment cannot be waived by a State prosecutor. See generally Justice and the Military, supra, at 197.

4. The fact that Solorio and the Alaska victims were no longer in Alaska, 21 M.J. at 257, is completely immaterial. They left pursuant to

military orders. The military cannot now use the transfers--even if done in the ordinary course of business--as a basis to bootstrap the exercise of military jurisdiction over offenses that otherwise could not have been subject to that jurisdiction. Moreover, in our increasingly mobile society, State prosecutors have to deal with out-of-state defendants and witnesses every day in the week. There is nothing unusual (much less unique), therefore, in the hurdle that faced the Alaska prosecutor.

5. Similarly, the fact that witnesses might have to testify twice, or that separate State and federal rehabilitation programs might be available, 21 M.J. at 257-58, is scarcely

unique to the setting of this case. Precisely the same circumstances exist whenever an individual is prosecuted by both State and federal authorities or by two States. The military is covered by the Interstate Agreement on Detainers, 18 U.S.C. App. sec. 5 (1982); United States v. Greer, 21 M.J. 338, 340 (C.M.A. 1986),[11] one of the purposes of which is "to aid in rehabilitation efforts by securing a greater degree of certainty about a prisoner's future." 32 C.F.R. sec. 720.15(a)(1985); see Interstate Agreement art. I.

Congress has also directed, in Article 14(b) of the UCMJ, that delivery

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11. Alaska is also a party to the Interstate Agreement. Alas. Stat. secs. 33.35.010 to -.040.

of a sentenced military prisoner to civil authorities, "if followed by conviction, interrupts the execution of the sentence of the court-martial." 10 U.S.C. sec. 814(b)(1982); see also R.C.M. 1113(d)(2)(A)(ii). The purposes of this provision are "avoiding any conflict with the concurrent sentencing of civil courts and preserving intact independent military sentencing." See Edwards v. Madigan, 281 F.2d 73, 77 (9th Cir. 1960). The concern that animated the court below with respect to rehabilitation programs, therefore, is one that Congress has already addressed and resolved without the jurisdictional voraciousness implicit in the decision on review in this case.

6. Finally, the notion that the Coast Guard prosecutor might have wanted

to use the Alaska offenses as evidence of other crimes under the military equivalent of Rule 404(b) of the Federal Rules of Evidence, even if they were not before the court-martial for trial, 21 M.J. at 257-58, is irrelevant to the question of service connection. Jurisdiction determines the scope of what may be proven at trial, not vice versa.

In sum, there is no such thing as "pendent" court-martial jurisdiction, any more than there is "pendent" district court jurisdiction over State crimes committed by an individual who has also been charged under some federal law. The decision below pays lip service to the point, 21 M.J. at 257, but violates it in fact. Until United States v. Lockwood, 15 M.J. 1 (C.M.A. 1983)(2-1), which was

never examined here because it was decided before Congress expanded the certiorari jurisdiction, the Court of Military Appeals had consistently honored this principle by reversing off-base portions of cases other portions of which were service connected.[12] Corrective action by this Court is necessary to nip this new and disturbing approach in the bud.

In these times of increased concern about the arrogation of power to the Federal Government at the expense of the States, this Court should be slow to approve a new rule that injects the Federal Government (and especially the

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12. E.g., United States v. Shockley, supra; cf. Fleiner v. Koch, supra; see generally Justice and the Military, supra, at 178 (collecting cases).

military) into an area of interpersonal conduct that historically has been the responsibility of State and local authorities. The ACLU also questions whether public policy is advanced by a rule that increases the insularity of the military. The decision below accelerates the transformation of the military and its enormous dependent community into a khaki ghetto even further removed from the larger society which it serves.

The Court of Military Appeals "did not enthusiastically embrace the lessening of its jurisdiction" under O'Callahan. Willis, The United States Court of Military Appeals--"Born Again," 52 Ind. L.J. 151, 155 (1976). From the beginning, the military and its partisans have complained that the decision was

unwise because of the uncertainty it allegedly caused as to the contours of court-martial jurisdiction. In fact, however, the O'Callahan doctrine, particularly with the Relford gloss, quickly evolved into a well-defined set of rules. The only area of real uncertainty has been the narcotics problem, and that uncertainty has been dispelled by the Court of Military Appeals' recent decisions addressed specifically to that problem.[13]

As it happens, the real basis for concern over uncertainty is not one of unclear line-drawing, but rather the

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13. The ACLU does not concede the correctness of the approach employed by the court below in this area, but that issue is not before the Court in this case.

impact of extraordinary personnel turbulence on a 3-judge court. In these circumstances, the need for judicial restraint and adherence to stare decisis--always strong in the criminal law field--is unusually compelling.[14] We stress this factor lest the Court be misled into believing that the root of the difficulty in the decision below is inherent in either O'Callahan or Relford. It is emphatically not.

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14. See generally Hearings on H.R. 6406 and H.R. 6298 (Revision of the Laws Governing the U.S. Court of Military Appeals and the Appeals Process) Before the Military Personnel Subcomm. of the House Armed Services Comm., 96th Cong., 2d sess. 54-55, 63 (1980). The need for restraint is even stronger, of course, when there is a vacancy on a 3-judge court. See id. at 77, 79.

Conclusion

For the foregoing reasons, certiorari should be granted. Because the decision below so clearly conflicts with Bouie and Marks, summary reversal is appropriate. Alternatively, for the reasons stated in Point I of this brief, the Court might wish to defer action until it becomes clear whether the case will come before it following review of the conviction.

Respectfully submitted,

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